UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SHANNON CURTIS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 02-189-B***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR ATTORNEY FEES

The plaintiff has applied for an award of attorney fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, in this action in which, with respect to her Supplemental Security Income ("SSI") appeal, she obtained a remand for further proceedings before the Social Security Administration. EAJA Application for Fees and Expenses ("Application") (Docket No. 10).

The commissioner opposes the petition in its entirety on the ground that plaintiff's counsel Francis M. Jackson failed to differentiate between billing for his work and that of a less experienced attorney, Deanna L. White, thus assertedly precluding meaningful review of the fee sought. *See* Defendant's Opposition to Plaintiff's Motion for Attorney's Fees Under the Equal Access to Justice Act ("Opposition") (Docket No. 11) at 3-4, 9. Alternatively, the commissioner seeks reduction in the fee sought on the bases that (i) the hourly rate payable for White's services should be capped at $125 (rather than the $145 sought), (ii) the combined hours logged by Jackson and White (a total of 49.35) on this case, which raised garden-variety issues and was disposed of by voluntary remand prior to

oral argument, are excessive and (iii) there was a failure to exercise "billing judgment." *See id*. at 4-9.

In response, the plaintiff offers to pare her requested fee for the combined services of Jackson and White described in the original itemized bill from a total of $7,155.75 for 49.35 hours billed at $145 per hour to a total of $5,075 for 35.0 hours billed at $145 per hour. *See* Plaintiff's Reply Memorandum Regarding EAJA Fees and Expenses ("Reply") (Docket No. 14) at 5; Invoice dated July 2, 2003 submitted to Shannon Curtis from Jackson & MacNichol ("Invoice"), attached to Application. I find the plaintiff's proposed resolution reasonable, and recommend that the court adopt it, for the following reasons:

1. Although plaintiff's counsel was remiss in failing to make clear in his itemized statement which hours were billed by which attorney – an oversight that he is strongly advised to remedy in future fee submissions – the error does not in this case warrant a complete denial of the application. The EAJA provides, in relevant part:

> [A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). The commissioner concedes that the plaintiff was a prevailing party for these purposes. *See* Opposition at 2. She makes no argument that her position was substantially justified or that the billing omission constitutes a "special circumstance[] mak[ing] an award unjust." *See generally id.* She does cite *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991), for the proposition that the court has authority to deny an entire fee request if it finds that request grossly excessive and the record inadequate to determine what a reasonable fee should be. However, *Lewis* concerned a request for fees pursuant to 42 U.S.C. § 1988. *See Lewis*, 944 F.2d at 958. In any event,

inasmuch as I find, for reasons discussed below, that the plaintiff's request of $145 per hour for White's time is proper, I am unpersuaded that the lack of differentiation precludes meaningful assessment of the reasonableness of the combined fee request.

2. The plaintiff adequately establishes that payment at the rate of $145 per hour is appropriate for services rendered by White. The EAJA provides, in section 2412(d)(2)(A)(ii), that "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee." This subsection, which was amended in 1996 to increase the indicated dollar limit from $75 to $125, *see* Pub.L. 104-121, § 232(b)(1); 28 U.S.C. § 2412, Historical and Statutory Notes, also provides that the amount of fees awarded "shall be based upon prevailing market rates for the kind and quality of the services furnished."

The plaintiff has submitted satisfactory evidence that the prevailing market rates for services like those she provided in this case exceed $125 per hour. *See generally* Affidavit [of Deanna L. White] in Support of Application for EAJA Fees ("White Aff."), attached to Application; *see also* Supplemental Affidavit [of Francis Jackson] re Application for EAJA Fees ("Suppl. Jackson Aff."), attached to Reply, ¶ 2. The plaintiff has also submitted consumer price index information for the period since the $125 statutory maximum rate was enacted indicating that the percentage increase since then translates to a fee of $145 per hour. Affidavit [of Francis Jackson] in Support of Application for EAJA Fees ("Jackson Aff."), attached to Application, ¶ 7 & Exh. B thereto.[1] Accordingly, while no special factor in this case justifies an award at an hourly rate in excess of the statutory cap, the cost-of-living increase does.

[1] Jackson states in his affidavit that he appends a Bureau of Labor Statistics chart showing an increase in the "base" figure to 180.9 as of December 2002. *See* Jackson Aff. ¶ 7. In fact, the attached chart contains data only through April 2002, when the base was 179.8. *See* Exh. B to Jackson Aff. However, the difference between the two figures is negligible.

3. The commissioner herself takes the position that an investment of between twenty and forty hours would be reasonable in a case such as this. *See* Opposition at 4-5.

4. While, as the commissioner points out, portions of the Statement of Errors were indeed simply cut and pasted from statements of errors filed by Jackson in previous cases, *see id*. at 6-7 & exhibits thereto, the Statement of Errors as a whole reflects careful attention to the underlying record and tailored analysis of the manner in which the facts – including a series of treatments and diagnostic assessments undertaken in response to a puzzling ailment – drive the legal conclusions for which Jackson and White advocate, *see generally* Plaintiff's Itemized Statement of Specific Errors (Docket No. 6). In addition, while this was White's first Social Security appeal, *see* White Aff. ¶ 5, a circumstance in which one might expect extra time to have been spent simply in surmounting a learning curve, the plaintiff's proposed fee-request cutback, which forfeits fourteen hours of counsel's combined time, adequately compensates for that circumstance. Finally, while the commissioner questions whether there may have been duplication of effort between Jackson and White, *see* Opposition at 6, Jackson avers that this was not so, *see* Suppl. Jackson Aff. ¶ 4.

For the foregoing reasons, I recommend that the plaintiff be awarded a total of $5,075, representing a combined 35.0 hours of attorney time.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of August, 2003.

_____

David M. Cohen
United States Magistrate Judge

Plaintiff

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